Petition

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81-1433

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LARRY REIMNITZ,)
)
Petitioner,)
)
-vs-)
)
STATE OF ILLINOIS,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

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QUESTION PRESENTED

When the prosecution in a criminal case obtains a guilty verdict by lulling the trial judge into permitting irrelevant and highly prejudicial evidence to be introduced on an unfulfilled promise that relevancy would later be shown, and the accused then serves two years in the penitentiary before the prosecution's overreaching is corrected on appeal, may the prosecution, consistent with the Double Jeopardy clause of the Fifth Amemdment and the Due Process Clause of the Fourteenth Amendment, retry the accused?

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OPINIONS BELOW

The opinion of the Illinois Appellate Court reversing petitioner's conviction on direct appeal is reported at 72 Ill. App.3d 761, 391 N.E.2d 380 (1979), and is reproduced in the appendix at App. 1 - 8.

The opinion of the Circuit Court of Cook County granting petitioner's motion to dismiss is unreported, and appears at App. 9 - 18.

The opinion of the Illinois Appellate Court reversing the order of dismissal is reported at 97 Ill.App.3d 946, 423 N.E.2d 934 (1981), and appears at App. 19 - 26.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3): Discretionary review was denied by the Supreme Court of Illinois on November 30, 1981 (App. 27), and this petition for writ of certiorari is timely filed thereafter.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States which provides as follows:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .

This case also involves the Due Process Clause of the Fourteenth Amendment which provides as follows:

> . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

In 1977, petitioner was tried for the murder of his wife.[1] Over the objections of defense counsel, and repeated requests for a mistrial, the prosecution was permitted to introduce evidence that long after the death of his wife, petitioner had engaged in a homosexual sex

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[1] The body of petitioner's wife was discovered by petitioner and a family friend, David Spangler, on January 16, 1975 in the rear seat of the family car. Petitioner was questioned about the offense, and gave a seventy five page exculpatory statement. No evidence linking petitioner to the offense was secured, and petitioner was released.

In late August of 1975 petitioner was again questioned about the offense. During this interrogation, petitioner admitted that earlier that month he had engaged in a homosexual sex act with Spangler. Interrogation lasted for 12 hours, and succeeded in eliciting from petitioner a confession that he had killed his wife. Petitioner's contention that the confession was involuntary has never been rebutted by the prosecution. (App. 7.)

act.[2]

Testimony about the homosexual incident had been permitted by the trial judge on the prosecutor's promise that relevance would be shown. Although relevancy of this testimony was never shown, the trial judge refused to grant a mistrial and the jury found petitioner guilty of murder. Petitioner's bail was revoked, and he served two years in the penitentiary before his conviction was reversed.

In reversing petitioner's conviction, the Illinois Appellate Court held that

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[2] The prosecution brought this information to the attention of the jury in two ways. First, testimony of the homosexual sex act was elicited during the direct examination of the two police officers who had received the confession. (App. 3.) Second, after the prosecution had been permitted to cross-examine petitioner about the details of the homosexual episode, the prosecution was permitted to call Spangler in rebuttal to testify that the sex act had involved oral genital contact. (App. 6.)

the jury should not have been exposed to this prejudicial testimony. (App. 4.) The reviewing court recognized that the prosecution's use of testimony about the homosexual sex act had served two improper purposes: first, it had caused the jury to view petitioner as an evil person. (App. 5.) Second, it had unduly influenced the jury to discount petitioner's credibiilty when he testified in his own behalf, denied the voluntariness of his confession, and denied any involvement in his wife's death. (App. 6.)

On remand, the trial court found that the prosecution's use of testimony about the homosexual incident constituted "prosecutorial overreaching."(App. 17) On this finding, the trial court concluded that it would be fundamentally unfair and contrary to the Double Jeopardy protections of the state and federal constitutions to allow a retrial. (App. 18.)

Accordingly, the indictment was dismissed. (Id.)

On the state's appeal, the Illinois Appellate Court concluded that the trial court's finding of prosecutorial overreaching was insufficient to bar a retrial. In the view of the Appellate Court, a retrial would be constitutionally prohibited only upon proof that the prosecutor's use of testimony about the homosexual sex act was "deliberate misconduct . . . calculated to deprive defendant of a fair trial." (App. 23.)[3]

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[3] Petitioner's request for discretionary review in the Illinois Supreme Court was denied without opinion. (App. 27.)

ARGUMENT

In United States v. Dinitz, 424 U.S. 600 (1976), the Court held that when a criminal defendant's successful request for mistrial is precipitated by "prosecutorial or judicial overreaching," a subsequent trial on the same charges is barred by the Double Jeopady Clause of the Fifth Amendment. Id. at 607 (quoting from United States v. Jorn, 400 U.S. 470, 485 (1971)). This case raises substantial questions concerning the scope of the Dinitz rule.

Petitioner was tried for the murder of his wife. The prosecution's case was not strong, but it became much stronger when, over petitioner's timely objections, the prosecutor was permitted to introduce testimony that long after the death of his wife petitioner had been involved in a homosexual incident.

Testimony about the homosexual incident was grossly unfair and buttressed the prosecution's weak case in two improper ways. First, testimony about the homosexual incident caused the jury to view petitioner as an evil person. (App. 5.) Second, it unduly influenced the jury to discount petitioner's credibility when he testified in his own behalf, disputed the voluntariness of his confession, and denied any involvement in his wife's death. (App. 6.)

The trial judge had allowed the jury to hear testimony about the homosexual incident on the prosecutor's representations that additional evidence would be introduced and relevance would be shown. When relevance was not shown, the trial judge should have granted petitioner's motion for a mistrial. The trial judge however, erroneously refused to grant a mistrial, and the jury found petitioner guilty.

The Illinois Appellate Court reversed petitioner's conviction without dissent. The state appellate court characterized the relevancy of the testimony about the homosexual incident as "extremely tenuous," (App. 7) and held that admission of testimony about the homosexual act had deprived petitioner of his "right to be tried solely for the murder of his wife." (App. 6.)

The question presented therefore is whether under the circumstances of this case, the Double Jeopardy clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment prohibits the state from trying again to obtain a conviction.[4] The state trial court, on

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[4] Although in Burks v. United States, 437 U.S. 1 (1978) and United States v. Scott, 437 U.S. 82 (1978) the Court stated in general terms that reversal for trial error does not bar retrial, "[t]here is some room for doubt whether these statements were meant to apply to (footnote continued)

remand, concluded that it would be fundamentally unfair to retry petitioner, and dismissed the indictment. (App. 18.) On the state's appeal, the Illinois Appellate Court reversed, finding that the prosecutor's overreaching at the first trial had been insufficient to bar a retrial. (App. 23-24.)

When, as here, the prosecution has succeeded in obtaining a tainted conviction by unfairly prejudicing a jury with testimony about a homosexual incident of negligible relevance, permitting the prosecution a chance to try again transforms

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(footnote 4 continued)

the situation of bad faith prosecutorial overreaching." United States v. Roberts, 640 F.2d 225, 230 (9th Cir. 1981) (Norris, J., dissenting).

This case would be in the same posture if, because of the prosecutor's overreaching, the trial judge had granted a mistrial. That the prosecutor's overreaching was corrected by a reviewing court, rather than by the trial court, should, as in Burks v. Unitd States, 437 U.S. at 11, "make no difference."

the first trial from the "main event" into a "tryout on the road." This is improper. As the Court emphasized in Wainwright v. Sykes, 433 U.S. 72 (1977),

> [T]he trial of a criminal case in state court [should be viewed] as a decisive and portentous event." A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable. . . Id. at 90.

Permitting a retrial after prosecutorial overreaching has deprived an accused of a fair trial grants a license

to the prosecution to introduce irrelevant but prejudicial evidence in the hope of obtaining a conviction which will be upheld on appeal because the error is deemed harmless. Just as the contemporaneous objection rule of Wainwright v. Sykes insures that the first trial will be the "main event," so too prohibiting a retrial after prosecutorial overreaching has denied an accused a fair trial will insure that the prosecutor will make that first trial as free of error as possible.

Courts which have considered claims of an accused that a retrial should not be permitted because of prosecutorial overreaching have reached conflicting results. As did the Illinois Appellate Court in this case, some courts have held that that prosecutorial overeaching will bar a retrial only when the misconduct is

intended to provoke a mistrial.[5] The Courts of Appeals for the Fifth and Eighth Circuits have concluded that the prosecutorial overreaching referred to in Dinitz is not limited to specific attempts to provoke a mistrial, but may also encompass other forms of serious government misconduct intended in a more generalized way to prejudice the defendant.[6]

Certiorari should be granted to resolve this important question.

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[5] See, e.g., United States v. Green, 536 F.2d 925 (4th Cir. 1978); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978); State of Wisconsin v. Copening, 303 N.W.2d 821 (1981); Robinson v. State of Alabama, 282 So.2d 284 (1981); Potenza v. Kasler, 437 N.Y.S.2d 189 (1981).

[6] United States v. Weaver, 565 F.2d 129 (8th Cir. 1977); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

January, 1982

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Appendix

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Appellee,	)	
vs.	)	NO. 78-724
LARRY REIMNITZ,	)	
Appellant.	)	

Opinion filed May 30, 1978

Mr. PRESIDING JUSTICE SIMON delivered the opinion of the court:

On January 16, 1975, Larry Reimnitz found the strangled body of his wife, Linda, in their car inside the open garage of their home. Eight months later, after a daylong, intensive interrogation by the police, he confessed to murdering her. Although at trial he recanted this confession, a jury convicted Reimnitz of the murder.

On appeal, Reimnitz maintains that the use of his confession at trial was reversible error. He claims that the

circumstances surrounding his confession rendered it "per se involuntary," and that its use at trial violated his constitutional protections. Reimnitz alleges that he was induced to visit the police station by false pretenses, and in that way he was deprived of the benefits of his attorney's presence; that prior to being interrogated, he was not given Miranda warnings; and that his confession was obtained by police promises of leniency and beneficial treatment.

Reimnitz also claims that he was denied a fair trial by the admission of evidence that he engaged in a homosexual act 7-1/2 months after the murder. The act took place with a close friend of Reimnitz while they were on vacation together and the friend was sleeping and unconsenting. The friend had been visiting Reimnitz in his home at the time Linda's body was found. The State was

allowed to elicit testimony regarding this incident from three witnesses (two police officers and the friend) despite repeated objections by Reimnitz's counsel. Besides objecting on the basis of its prejudicial nature, Reimnitz's counsel argued that such testimony was irrelevant because of the length of time between the murder and this incident. Although the trial judge recognized the prejudicial character of the testimony, he allowed its admission on the stated assumption that its relevancy would subsequently be established.

Arguing in support of the admissibility of the evidence, the State maintains that such testimony revealed Reimnitz's motive for killing his wife -- his homosexual preference. Under the facts of this case, we believe that the probative value of a single act which occurred 7 months after the murder introduced to

establish a homosexual preference at the time of the murder, let alone a motive for the murder, is far outweighed by its inflammatory effect upon the jury. Therefore, this evidence should not have been admitted.

Otherwise acceptable evidence should be excluded if it tends to unduly prejudice the jury. As stated in McCormick, Evidence §185, at 438-9 (2d ed., 1972):

> "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues."

We believe that evidence of Reimnitz's homosexual acts was objectionable for both of the reasons advanced in McCormick.

Illinois courts have often reiterated the principle that evidence of other crimes which tends to inflame a jury should not be admitted. In People v. Oliver (1977), 50 Ill. App.3d 665, 674, 365 N.E.2d 618, this Court acknowledged that although "[e]vidence of another crime is admissible if it fairly tends . . . to prove . . . motive, . . . when the nature of the other crime is such as to highly inflame prejudice against defendant in the minds of the jury, it should be excluded." Courts must be hesitant to admit evidence which might "overpersuade the jurors and cause them to convict the defendant as an 'evil person' worthy of punishment rather than because he is guilty of the crime charged." People v.

Butler (1978), 63 Ill. App.3d 132, 139, 379 N.E.2d 703.

There is an additional reason for rejecting the evidence in question in this case. The nature of Reimnitz's defense, which involved recantation of his confession, depended upon his credibility. Proof that he engaged in a homosexual act for which he was never charged, may not only have inflamed the jury to view Reimnitz as an evil person, but may also have impermissibly influenced the jury to discount his credibility. This likelihood is enhanced by the fact that Reimnitz and his friend contradicted each other in their testimony regarding what had actually occurred in the homosexual encounter.

Reimnitz had the right to be tried solely for the murder of his wife. We believe the admission of testimony proving his homosexual act prevented this.

evidence of this nature was more likely to prejudice the jury against Reimnitz than to establish his guilt. Any suggestion that the incident in August 1975 proved a motive for the murder which occurred in January of that year is extremely tenuous.

Because reference to Reimnitz's homosexual act should not have been admitted, we reverse his conviction and remand this cause for a new trial. In so doing, we refrain from passing upon whether Reimnitz's confession was voluntary and therefore properly admitted at this trial. Further proceedings in this case may bring forth additional evidence bearing on this issue. For example, the State did not respond to Reimnitz's testimony that the deputy sheriffs who received his confession made implied promises of benefits and leniency to induce him to confess. We therefore believe

that consideration of the admissibility of the confession would be premature at this time. The propriety of admitting the confession should be left open to be considered with such additional evidence as the prosecutor and the defendant may present on remand.

Reversed and remanded for a new trial.

McGILLICUDDY and RIZZI, JJ., concur.

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	NO. 75-6384
LARRY REIMNITZ,	)	
Defendant.	)	

Extract of Proceedings, March 3, 1980, before the Honorable William Cousins, Jr.
* * * [21]THE COURT: The court has considered the motions, which is for a dismissal of the indictment on grounds of former jeopardy, and the court has read the authorities cited in the motion. The court has read the opinion written by Justice Simon in reversing and remanding this case, and the court has now considered the arguments of counsel.

The matter of double jeopardy that arises by virtue of the 5th amendment and the 14th amendment of the United States Constitution, this State also has provisions for dismissal of indictments or

informations where double jeopardy is involved. The law is not so difficult to come by as is the application of the law to the facts.

First, the provision in the constitution is that no person will be twice placed in jeopardy as to his life or limb for the same charge relates to jeopardy, and a person being jeopardized twice does not relate to being punished twice, and this notion arises, the courts say, out of an Anglo American condition, but the court will [22] say that that notion arises out of a sense of fundamental fairness in a Democracy. The law as in the Ball case has always been the law and is now the law. That case relates to what is usually and customarily a case -- where a case is reversed and remanded because of errors during the trial, or in that case there was something wrong with the indictment or information at the outset.

The courts have stated in the cases cited the general proposition that generally a person may be retried where the case is reversed and remanded because of errors committed during the course of a trial. There are some particular situations which the courts have dealt with and commented on whether or not the defendant has made a motion for mistrial or the State has made a motion for mistrial or the court has, on its own motion, terminated the proceedings, and generally where a defendant makes a motion for mistrial and it is granted, then a new trial does not contravene the double jeopardy provisions. However, whether or not a defendant makes a motion for a new trial or the State makes the motion for a new trial is not controlling, it depends on the facts and circumstances of the particular case. The courts have considered the matter of double [23]jeopardy where

the prosecutorial conduct during the course of the trial has been considered to have resulted in the adducing of testimony which prejudiced the defendant's rights, and the defendant, in the motion has set forth a number of cases which have recited that double jeopardy can be invoked by a new trial and to bring about the dismissal of a charge where there had been prosecutorial overreaching. A number of cases cited have that, and those cases do not include the Jorn case and the Tateo case, which discuss the matter of double jeopardy at length. But it is recited in some cases that double jeopardy may bar reprosecution where the prosecutors have overreached.

And then the defendant has cited other case, including Carsey v. United States, where the court found that double jeopardy applied where the court granted the State's motion for mistrial after the

defense counsel had mentioned that there had been a previous mistrial.

The case of United States v. Kessler, which has been emphasized by the defense and has been referred to by the State in argument, the defense emphasized this case in its motion, and there the court, in a case which involves some explosives and the use of testimony, hearsay [24]of some persons who were supposedly co-conspirators, the court found that that evidence deprived the defendant of a fair trial and that the State shouldn't have a second opportunity to have the defendant found guilty, and the petitioner here now has also cited the case of the United States v. Martin, which the State has referred to, a lawyer was on trial in a tax case and there had been some discussion of a motion in limine made to bar the use of the Grand Jury transcript and other testimony relating to the source of

the loans, and where the State had indicated it would not use such, but then proceeded to read from the transcript. The court here indicated in its opinion and finding that double jeopardy did apply, that there was intentional misconduct.

And then there is the case of United States v. Broderick, where the prosecutor was admonished about the use of certain testimony, but the prosecutor then proceeded to use that testimony, and the prosecutor, when the issue was raised relative to the use of the testimony, indicated that the prosecutor had looked up the law and it was the prosecutor's view that what had been adduced qualified, even though it was hearsay, as qualified hearsay. Now, the trial court, when that [25]was brought up, didn't say no too the prosecutor's theory; it would therefore appear that this was not done

with a malicious motive because of misapprehension of what the law was, but the determination as to whether there is double jeopardy turns upon whether or not what has been done is grossly negligent, is such that it would -- if it had not been done, would the defendant have had any different posture during the course of the trial.

Another way of putting it is because it was done it rather foreclosed the defendant's prospects for having a fair trial.

In the case at bar, in this case, the defendant was tried, and during the course of the trial, the manner of the criminal act, which was brought out during the course of the trial, was brought to the attention of the court by way of a motion in limine, and then when the State started to adduce the evidence, the State, when the matter was raised again,

indicated that it would be linked up. The matter related to a homosexual act between the defenddant and a person by the name of Spangler.

The court, having had the matter brought to its attention before, and having indicated that the evidence did not appear to be admissible without something more, and then later having had the evidence admitted, [26]was left without a way to remedy the situation, and in the opinion of the Appellate Court, the Appellate Court has found or decided that that evidence was improper evidence.

It would appear that the State was proceeding on the theory that this act some seven months after this incident established motive and was admissible, but the State was in error and the nature of the testimony was such that the Appellate Court has written that a jury would be calculated to be prejudiced.

This Court does not generally find questions to be close, as when the court has considered them and reached a decision, any closeness that may have existed has been resolved. In this case, though, the Court will say that it was a close question. However, having considered the cases, having considered the arguments of counsel and having considered the reasons for the double jeopardy clause, in particular the interpretations of the court that the double jeopardy clause is applicable where there is prosecutorial overreaching, and having read the dissertations in the various cases relative to this, and in particular in the case of United States v. Martin, and having considered the opinion in the Kessler case, it is the decision of this Court that there [27]was prosecutorial overreaching in this case, and that is indicated in the Jorn and Tateo cases, and that is

also indicated in the State of Illinois cases, People v. Hanley and People v. Hill, and that it would be fundamentally unfair and a deprivation of the defendant's constitutional rights that he not be placed in jeopardy twice for the same crime; and accordingly, without addressing itself to the matter of the confession which this Court considers to be unnecessary at this time, the court finds the motion based on double jeopardy to be well founded, and the charge will be dismissed.

* * *

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Appellant,	)	
vs.	)	No. 80-856
LARRY REIMNITZ,	)	
Appellee.	)	

Opinion filed June 17, 1981

MR. JUSTICE McNAMARA delivered the opinion to the Court:

Defendant, Larry R. Reimnitz, was charged with murder of his wife. In a trial presided over by Judge Robert J. Collins a jury convicted defendant of that charge and the court sentenced him to a term of 50 to 100 years. On appeal this Court reversed the conviction and remanded the cause of a new trial on the grounds that improper evidence prejudical to defendant had been received. (People v. Reimnitz, (1979), 72 Ill. App.3d 761,

391 N.E.2d 380.) On remand Judge William Cousins, Jr., granted defendant's motion to dismiss the indictment on the grounds that retrial of defendant pursuant to this Court's mandate would violate his right against double jeopardy. The State appeals from the order dismissing the indictment.

The facts regarding the crime and conviction are set forth in the earlier opinion of this Court.

> "On January 16, 1975, Larry Reimnitz found the strangled body of his wife, Linda, in their car inside the open garage of their home. Eight months later, after a day-long, intensive interrogation by the police, he confessed to murdering her. Although at trial he recanted this confession, a jury convicted Reimnitz of the murder."

At trial, over defendant's objections, evidence was presented that, 7-1/2 months after the murder, defendant had engaged in a homosexual act with an unconsenting, close friend. The State

maintained that the evidence of defendant's homosexual preference disclosed his motive for killing his wife. This Court held that the probative value of the testimony concerning the homosexual act was far outweighed by its inflammatory effect upon the jury. On remand Judge Cousins held that the introduction of the foregoing evidence found to be improper by this Court constituted "prosecutorial overreaching" and therefore prevented a second trial.

When a conviction is set aside for grounds other than sufficiency of the evidence, remand and a new trial are proper and are not a violation of the concept of double jeopardy. (Price v. Georgia, (1970), 398 U.S. 323.) This is so even where the matter upon which the reversal of conviction is based involves violation of defendant's constitutional rights. (Eubank v. Louisiana, (1958),

356 U.S. 548.) Where, however, a mistrial has been declared due to deliberate misconduct of the prosecutor calculated to deprive defendant of his right to a fair trial, the case cannot be tried a second time. (United States v. Dinitz, (1976), 242 U.S. 600; People v. Hill, (1975), 34 Ill. App.3d 193, 339 N.E.2d 405.) Retrial has been held improper in such cases because to hold otherwise would allow a prosecutor by improper conduct to abort or terminate a trial so as to have another chance to secure a conviction against the defendant. (United States v. Jorn, (1971), 400 U.S. 470; People v. Pendleton, (1979), 75 Ill. App.3d 580, 394 N.E.2d 496.) When a mistrial is made necessary due to judicial or prosecutorial overreaching, a retrial is manifestly unjust and violates the double jeopardy principle. United States v. Dinitz; United States v.

Martin, (8th Cir. 1977), 561 F.2d 135; United States v. Kessler, (5th Cir. 1976), 530 F.2d 1246.

Defendant here maintains that the absence of a declaration of a mistrial is unimportant. He urges that the significant factor in applying the double jeopardy concept is the prosecutorial overreaching involved in securing the original conviction. We find it unnecessary to reach the issue whether the declaration of a mistrial is essential to the application of the double jeopardy principle so as to prevent retrial. We simply find that there is no showing of deliberate misconduct on the part of the prosecutor calculated to deprive defendant of a fair trial. The State offered testimony that defendant engaged in a homosexual act. The State's purpose in adducing such evidence was to offer a motive for the murder of his wife. This

Court found that the probative value of such testimony was far outweighed by its inflammatory effect on the jury, and that its introduction into evidence constituted reversible error. In so holding, this Court did not even suggest that the prosecutor had engaged in calculated misconduct. What had occurred was that evidence was incorrectly received into evidence. Upon remand, retrial was completely proper.

We find no merit in defendant's additional argument, not reached by Judge Cousins, that a statement contained in this Court's earlier opinion regarding defendant's confession is a separate and distinct double jeopardy ground for not permitting retrial. In its opinion, this Court stated at p. 764:

> "Because reference to Reimnitz's homosexual act should not have been admitted, we reverse his conviction and remand this cause for a new trial. In do doing, we refrain from passing upon whether

> Reimnitz's confession was voluntary and therefore properly admitted at his trial. Further proceedings in this case may bring forth additional evidence bearing on this issue. For example, the State did not respond to Reimnitz's testimony that the deputy sheriffs who received his confession made implied promises of benefits and leniency to induce him to confess. We therefore believe that consideration of the admissibility of the confession would be premature at this time. The propriety of admitting the confession should be left open to be considered with such additional evidence as the prosecutor and the defendant may present on remand."

Despite this Court's refusal to consider whether defendant's confession was voluntary and thus properly received in evidence, defendant maintains that the foregoing dicta amounts to a finding that the confession was improperly admitted. We think not, and we also believe that this Court's unwillingness to consider the voluntariness of the confession has no effect upon the State's right to retry defendant following reversal and remand.

Along with the interest of a defendant in receiving a fair trial is the corresponding interest of the People in securing the convictions of those guilty of criminal offenses. United States v. Tateo, (1964), 377 U.S. 463.

For the foregoing reasons, the judgment of the Circuit Court of Cook County dismissing the indictment is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

RIZZI, P.J., and WHITE, J., concur.

ILLINOIS SUPREME COURT
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SPRINGFIELD, ILL. 62706
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November 30, 1981

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No. 55437 - People State of Illinois, respondent, vs. Larry Reimnitz, petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause. Mr. Justice Simon took no part.

Very truly yours, .

Clell L. Woods

Clerk of the Supreme Court

Opposition

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS

No. 81-1433

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY REIMNITZ,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court for the First Judicial District, Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the petitioner's claim that the double jeopardy clause bars retrial after a conviction is reversed because of a trial error is worthy of review by this court.

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No. 81-1433

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY REIMNITZ,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court for the First Judicial District, Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent asks this court to deny the petition for Writ of Certiorari to review the judgment of the Appellate Court of Illinois insofar as the petitioner's issue does not raise a question of constitutional proportion that is worthy of review.

OPINIONS BELOW

The relevant opinions below have been included in the petitioner's appendix to this petition and are therefore not contained in this Brief in Opposition.

The opinions include:

People v. Reimnitz, 72 Ill. App. 3d 761, 391 N.E.2d 380 (1st Dist. 1979), where the petitioner's conviction was reversed on direct appeal and the cause remanded for a new trial;

The relevant transcribed portions of the hearing on the petitioner's motion to dismiss the indictment, granted on grounds of double jeopardy;

People v. Reimnitz, 97 Ill. App. 3d 946, 423 N.E.2d 934 (1st Dist. 1981) where the dismissal was reversed and the cause remanded for further proceedings.

The denial of the petition for leave to appeal to the Illinois Supreme Court.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

The defendant was convicted in the Circuit Court, Cook County, Illinois, of the murder of his wife. On January 26, 1975, he found the strangled body of his wife, Linda, in their car inside the open garage of their home. Eight months later, after a day-long, intensive interrogation by the police, he confessed to murdering her. Although at trial he recanted this confession, a jury convicted him of the murder.

On May 30, 1979, the Illinois Appellate Court, First District, held that the trial court erred in admitting evidence that the defendant had engaged in a homosexual act seven and one-half months after the murder. The probative value of such evidence to establish homosexual preference as the defendant's motive for the murder was far outweighed by its inflammatory effect upon the jury. It reversed and remanded for a new trial.

On remand, the Circuit Court, Cook County, Illinois, granted the defendant's motion to dismiss the indictment on grounds that retrial of the defendant would violate the defendant's double jeopardy rights.

The State appealed and, for reasons set forth in the argument of this brief, the appellate court reversed and remanded, June 17, 1981.

The Illinois Supreme Court denied leave to appeal, November 30, 1981.

REASON FOR DENYING THE WRIT

THE PETITIONER'S CLAIM THAT THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL AFTER A CONVICTION IS REVERSED BECAUSE OF A TRIAL ERROR IS NOT WORTHY OF REVIEW BY THIS COURT.

The petitioner is asking this court to hold that he cannot be retried after his murder conviction was reversed because of a trial error. He bases his claim on the double jeopardy clause.

This claim is not deserving of this court's time. The law is already well-settled that the double jeopardy clause does not preclude the government from retrying a defendant whose

conviction is set aside because of an error in the proceedings. *Burks v. United States,* 437 U.S. 14, 98 S. Ct. 2141, 2149, 57 L.E.d. 2d 1 (1978); *United States v. Tateo,* 377 U.S. 463, 465, 84 S. Ct. 1587, 1589, 12 L.E.d. 2d 448 (1964).

The error in this case is only a trial error. It occurred when the trial court admitted evidence that had an inflammatory effect on the jury far outweighing its probative value. The evidence consisted of testimony that the petitioner had engaged in a homosexual act with an unconsenting close friend 7½ months after the murder.

The petitioner, however, seeks to invoke a possible exception that a retrial violates the double jeopardy principle when made necessary by prosecutorial overreaching. *United States v. Dinitz,* 424 U.S. 600, 96 S. Ct. 1075, 47 L.Ed.2d 267 (1967). And yet the Illinois Appellate Court specifically found that "there is no showing on the part of the prosecutor calculated to deprive defendant of a fair trial." *People v. Reimnitz,* 97 Ill. App. 3d 946, 423 N.E.2d 934, 936 (1st Dist. 1981). The State's purpose in adducing such evidence was to offer a motive for the murder of his wife. But because of its outweighing inflammatory effect on the jury it was incorrectly received into evidence. Retrial on that basis was completely proper. *Reimnitz,* 423 N.E.2d at 936.

The petitioner's claim would require this court to reject the state court's finding of fact and substitute its own judgment as to the facts. But unless the petitioner shows that the findings are not supported in fact, the findings of the state court will not be disturbed. *Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952). Since the petitioner has made no such showing, this court must accept the state court finding and reject the petitioner's claim.

In closing, the respondent makes two final points. First, this court in *Dinitz* sought to protect a defendant from retrial

where a mistrial had been provoked by the government's bad faith conduct. The respondent points out that in this case there was no declaration of mistrial. Rather, the conviction was reversed on appeal. This factor makes the *Dinitz* rule inapplicable. However, even if the *Dinitz* rule were applicable, relief must be denied for the reasons stated above.

Second, the petitioner has referred to *United States v. Weaver*, 565 F.2d 129 (8th Cir. 1977) and *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976). He claims that in these cases the circuit courts have concluded that the prosecutorial overreaching referred to in *Dinitz* is not limited to specific attempts to provoke a mistrial, but may encompass other forms of government misconduct intended in a more generalized way to prejudice the defendant. However, the petitioner has misread these cases. They do not purport to expand *Dinitz*.

As far as the applicable law is concerned, the circuit courts are in agreement with each other and with this court. The petitioner's claim presents nothing exceptional or unsettled. It does not deserve the attention of this court.

CONCLUSION

For these reasons, the People of The State of Illinois ask this court to deny the petition for writ of certiorari.

Respectfully submitted,

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